

APPENDIX Q

***JURISDICTIONAL DETERMINATION LETTER REGARDING WATERS
OF THE UNITED STATES, U.S. ARMY CORPS OF ENGINEERS***



DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
190 FIFTH STREET EAST
ST. PAUL, MN 55101-1638

July 26, 2004

REPLY TO
Construction-Operations
Regulatory (04-157764-DJP)

Ms. Joan Delabreau
Memomonee Tribe
W2908 Tribal Office Road
P.O. Box 910
Keshena, Wisconsin 54135

Dear Ms. Delabreau:

This is in response to a letter dated July 8, 2004, that we received from Analytical Environmental Services (AES) requesting a Corps jurisdictional determination and concurrence with the "Delineation of Waters of the United States" they completed on your Dairyland Greyhound Park property. The project site is located in the SE $\frac{1}{4}$, Sec. 31, T. 2N., R. 22E., Kenosha County, Wisconsin.

We have reviewed the delineation report provided and have determined that it is adequate to establish the limits of Corps of Engineers Clean Water Act jurisdiction. We have also completed a jurisdictional determination regarding the delineated wetlands. This jurisdictional determination takes into consideration the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. Corps of Engineers (the SWANCC decision). The 223-acre area encompassed by this jurisdictional determination includes water bodies/wetlands that are approximately 30-acres in size, as shown on the enclosed drawing.

The subject water bodies labeled "A", "B", "C", "D", and "E" in the AES Delineation Report are not "waters of the United States" because they are: (1) not "navigable waters" as defined by Federal law, (2) not interstate waters, (3) not part of a tributary system to (1) or (2), (4) not wetlands adjacent to any of the foregoing, and (5) not an impoundment of any of the above.

In addition, the interstate commerce nexus to these particular water bodies is insufficient to establish Clean Water Act jurisdiction. These water bodies are therefore not subject to regulation by the Corps of Engineers under Section 404 of the Clean Water Act. Please note that water that is not navigable under Federal law may still be "navigable" as defined by state law (and may therefore be subject to regulation by the state).

We have also determined that the subject water body labeled "F" in the AES Delineation Report is adjacent to the Kilbourn Road Ditch, a tributary to the Des Plaines River, an interstate water of the United States and, therefore, is subject to Corps of Engineers Section 404 Clean Water Act jurisdiction. If grading and/or fill activities were proposed in the vicinity of wetland "F" additional wetland delineation data sheets would be needed to define the actual wetland boundary.

This letter is valid only for the project referenced above. If any change in design, location, or purpose is contemplated, contact this office to avoid doing work that may be in violation of Federal law. PLEASE NOTE THAT THIS CONFIRMATION LETTER DOES NOT ELIMINATE THE NEED FOR STATE, LOCAL, OR OTHER AUTHORIZATIONS, SUCH AS THOSE OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES OR KENOSHA COUNTY.

If you disagree with this jurisdictional determination, you may provide new information. Please follow the directions in Section E of the enclosed Notification of Administrative Appeal Options and Process and Request for Appeal.

Thank you for your cooperation with the U.S. Army Corps of Engineers regulatory program. If you have any questions, contact Dale J. Pfeiffle in our Waukesha office at (262) 547-0868. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,


Fu Robert J. Whiting
Chief, Regulatory Branch

Copy furnished:

Heidi Hopkins, WDNR, Sturtevant, WI
John Miller, analytical Environmental Services, Sacramento, CA

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND
REQUEST FOR APPEAL

Applicant: Menomonee Nation		File Number: 04-157764-DJP	Date: July 26, 2004
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A	
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B	
	PERMIT DENIAL	C	
	APPROVED JURISDICTIONAL DETERMINATION	D	
X	PRELIMINARY JURISDICTIONAL DETERMINATION	E	

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at <http://usace.army.mil/inet/functions/cw/cecwo/reg> or Corps regulations at 33 CFR Part 331.

A. INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approve jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B. PROFFERED PERMIT: You may accept or appeal the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C. PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

D. APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E. PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION.

If you have questions regarding this decision and/or the appeal process you may contact:

Dale J. Pfeifle
U.S. Army Corps of Engineers
Waukesha Field Office
1617 E. Racine Avenue, Room 101
Waukesha, WI 53186
Telephone (262) 547-0868

If you only have questions regarding the appeal process you may also contact:

Division Engineer
c/o Martha S. Chieply, Appeal Review Office
CEMVD
P. O. Box 80
Vicksburg, MS 39181-0080
Telephone (601) 634-5820

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.	Date:	Telephone number:
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JURISDICTIONAL DETERMINATION
U.S. Army Corps of Engineers, St. Paul District

APPLICANT: Menomonee Nation

PROJECT LOCATION/WATERWAY: Dairyland Greyhound Park/Kilbourn Road Ditch and its adjacent wetlands.

FILE NUMBER: 04-157764-DJP

PROJECT REVIEW COMPLETED: ☒ Office

☐ Field

Jurisdictional Determination (JD): (For sites evaluated under 33 CFR §320-330)

- ☒ Preliminary JD - Based on available information, ☒ there appear to be or ☐ there appear to be no waters of the United States on the project site. A preliminary JD is not appealable.
- ☐ Approved JD - ☐ There are or ☐ there are no waters of the United States on the project site, as identified in the basis of jurisdictional determination indicated below. An approved JD is an appealable action (33 CFR §331). The Request for Appeal form may be downloaded from the Corps' Mississippi Valley Division web site at: http://www.mvd.usace.army.mil/nwsinfo/mvd_appeals/pdf/naoraf.pdf or by calling 651-290- 5375.

Basis of Jurisdictional Determination: (Reference 33 CFR §328.3(a) and 329)

- ☐ (1) The waters are currently used, or were used in the past, or may be susceptible for use to transport interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide.
- ☐ (i) Section 10 waters
- ☐ (ii) Other waters that are navigable (document navigability and use in Rationale, below)
- ☐ (2) The waters or wetlands are interstate waters including interstate wetlands¹
- ☐ (3) The waters or wetlands are other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could effect interstate commerce including any such waters:
- ☐ (i) which are or could be used by interstate or foreign travelers for recreational purposes.
- ☐ (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☐ (iii) which are or could be used for industrial purposes by industries in interstate commerce.
- ☐ (4) The waters or wetlands are impoundments of jurisdictional waters.
- ☒ (5) The waters are a tributary to a water identified in (1) - (4) above
- ☒ (6) The wetlands¹ are adjacent² to interstate or other waters of the US, except for those wetlands adjacent to other wetlands.

Rationale for Basis (applies to any boxes checked above). *If the jurisdictional water is not itself a Section 10 regulated water or water that is navigable, describe the surface connection to the downstream Section 10 water or water that is navigable. If (1) or (3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection:* **The Kilbourn Road Ditch and its adjacent wetlands are tributary to the Des Plaines River, an interstate water of the United States.**

Lateral Extent of Jurisdiction (Reference 33 CFR §328 and 329):

- ☐ Ordinary High Water Mark indicated by:
- ☐ clear, natural line on the bank ☐ litter and debris ☐ shelving ☐ changes in soil
- ☐ destruction of terrestrial vegetation ☐ other: _____
- ☐ Wetland, as shown on the attached wetland delineation map and/or in a jurisdictional report prepared by: _____ (Attach data sheets representing each plant community type, etc.)
- ☐ Additional supporting information, (attach when appropriate) _____

Preparer:

Dale N. Pfeiffer

Date:

July 26, 2004

¹Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

²The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.